plies "whether or not such statute or regulation be valid." *Id.* at 10a (quoting 28 U.S.C. 2680(a)).

The court of appeals also rejected petitioner's contention that the law enforcement proviso of 28 U.S.C. 2680(h) rendered the due care exception inapplicable to claims based upon intentional torts by law enforcement officers. Pet. App. 7a-8a. The court held that when Congress amended Section 2680(h) in 1974 to permit certain intentional tort claims based upon the conduct of law enforcement officers, "it knew the effect of § 2680(a)" and "the exceptions to the Act already in existence were intended to remain in effect." *Id.* at 8a.

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or that of any other court of appeals. The petition for a writ of certiorari should be denied.

1. As the courts below concluded, the plain text of the FTCA's due care exception bars petitioner's claim. As noted, that provision excludes from the United States' waiver of its sovereign immunity "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid." 28 U.S.C. 2680(a).

Petitioner's claim falls squarely within this exception. His false imprisonment claim is based on his detention by federal officers, without the opportunity for a bail hearing, pending the resolution of his removal proceedings. But the federal officers who detained petitioner were executing the terms of a federal statute, 8 U.S.C. 1226(c), that mandated that they detain petitioner without a bail hearing. Section 1226(c)(1)(B) pro-

vides that the "Attorney General *shall* take into custody any alien who * * * is deportable by reason of having committed an offense covered in section 1227(a)(2) * * * (C)," which authorizes deportation for unlawful possession of a firearm. 8 U.S.C. 1226(c)(1)(B) (emphasis added). The statute further provides that the Attorney General may release an alien taken into custody only under certain conditions that do not apply—and petitioner does not contend apply—to petitioner. See 8 U.S.C. 1226(c)(2). As the Fourth Circuit recognized on appeal in petitioner's habeas case, Section 1226(c) "categorically bars the Attorney General from 'releas[ing] from custody' any alien convicted of an aggravated felony or firearm offense who is not in the federal witness protection program." *Welch*, 293 F.3d at 217. Thus, as the court of appeals held here, petitioner's detention without a bail hearing was "statutorily required," and the federal officers had no discretion to deviate from that statutory mandate. Pet. App. 9a-10a.

Moreover, the federal officers executed their statutorily prescribed obligation to detain petitioner "with due care" under 28 U.S.C. 2680(a). Indeed, petitioner does not contend that the officers failed to comply with the terms of the statute. Pet. App. 9a-10a; see *Welch*, 293 F.3d at 228 (noting, in petitioner's habeas case, that his detention "did not contravene the dictates of § 236(c)"). Rather, petitioner contends that the officers failed to act with due care because, even though the officers followed the statutory mandate, the detention was "outside the bounds of acceptable constitutional conduct." Pet. 20.

As the court of appeals concluded (Pet. App. 10a-11a), the plain text of the statute forecloses that argument. The due care exception expressly applies "whether or not" the statute the federal officers are exe-

cuting is "valid." 28 U.S.C. 2680(a). By its terms, this provision expressly retains the United States' sovereign immunity as to claims for money damages that are based upon acts or omissions of federal officers who are faithfully performing their obligations in accordance with federal statutes or regulations, even if those statutes or regulations are subsequently found to be invalid. Accordingly, the fact that the Fourth Circuit held, subsequent to petitioner's detention, that Section 1226(c) was unconstitutional (*i.e.*, invalid) as applied to petitioner cannot support petitioner's FTCA claim. Although petitioner asserts that courts "have struggled with when and how to apply" the due care exception, Pet. 19, he cites no case in which a court's application of the due care exception conflicts with the decision below.[2]

Indeed, if petitioner's reading of the due care exception were correct, challenges to the constitutionality of statutes could be brought by way of an FTCA action.[3]

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[2] There is no merit to petitioner's suggestion (Pet. 21-22) that application of the due care exception to the enforcement of an unconstitutional statute conflicts with certain decisions holding that the discretionary function exception does not apply to unconstitutional conduct. Those decisions are based upon the view that "[f]ederal officials do not possess discretion to violate constitutional rights or federal statutes." *Medina* v. *United States*, 259 F.3d 220, 225 (4th Cir. 2001) (quoting *United States Fid. & Guar. Co.* v. *United States*, 837 F.2d 116, 120 (3d Cir.), cert. denied, 487 U.S. 1235 (1988)). Whatever the merit or limits of that principle, it has no application to the non-discretionary conduct at issue in this case or to the distinct due care exception in Section 2680(a), which applies whether or not the statute pursuant to which the officer acted is unconstitutional.

[3] As petitioner notes (Pet. 26-27), he first challenged the constitutionality of Section 1226(c) through a petition for a writ of habeas corpus. At bottom, however, as the court of appeals recognized, petitioner's complaint in this FTCA action is "with the statute itself." Pet. App. 10a.

But, as this Court has made clear, the due care exception "bars tests by tort action of the legality of statutes and regulations." *Dalehite* v. *United States*, 346 U.S. 15, 33 (1953); see also *United States* v. *Gaubert*, 499 U.S. 315, 336 (1991) (Scalia, J., concurring) (noting that the Court has construed the due care exception "to mean that regulations '[can]not be attacked by claimants under the Act'") (quoting *Dalehite*, 346 U.S. at 42); H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942) (explaining that it is not "desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort").

In effect, petitioner is arguing for an interpretation of the FTCA under which, for the United States to avoid tort liability, federal officers would have to substitute their judgment for that of Congress, and violate the requirements of binding federal statutes and regulations, whenever they believe those requirements might be unconstitutional as applied to a given individual. Nothing in the FTCA supports such an outcome, nor is there any reason to believe that Congress intended federal officers in the field to second-guess its clear directives. Cf. *Cheek* v. *United States*, 498 U.S. 192, 206 (1991) (concluding that Congress did not contemplate that a taxpayer who believes the tax laws are unconstitutional "could ignore the duties imposed upon him" and refuse to pay his taxes). Petitioner was afforded an opportunity to challenge the constitutionality of Section 1226(c), and he successfully obtained judicial relief and thereby secured his release. But the text of the FTCA forecloses his attempt to obtain money damages for the actions of Executive Branch officers who were complying with

their obligation faithfully to execute laws enacted by Congress.[4]

2. a. The court of appeals likewise correctly concluded that the law enforcement proviso of 28 U.S.C. 2680(h) does not render inapplicable the due care excep-

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[4] As the United States suggested in the district court (but did not press at this stage of the proceedings), see, *e.g.*, C.A. App. 56, 115, there is a substantial question whether the Fourth Circuit's holding in petitioner's habeas case that Section 1226(c) was unconstitutional as applied to petitioner survives this Court's subsequent decision in *Demore*. As noted above, *Demore* upheld Section 1226(c) against constitutional challenge. 538 U.S. at 513. Although the court below stated without analysis that its decision in petitioner's habeas case "remains the final authoritative ruling" with respect to this case, Pet. App. 2a n.1, this Court's intervening decision in *Demore* represents a change in the controlling law such that neither preclusion principles nor the "law of the case" doctrine bars reconsideration of the earlier decision in the habeas case in this new, separate action for money damages. See, *e.g.*, *Commissioner* v. *Sunnen*, 333 U.S. 591, 600 (1948); *Agostini* v. *Felton*, 521 U.S. 203, 236 (1997).

Moreover, although the United States cited the Fourth Circuit's decision in petitioner's habeas case in its brief in *Demore* as illustrating that "exceptional circumstances that present special due process concerns can be addressed on a case-by-case basis," Gov't Br. at 48-49, *Demore*, *supra* (No. 01-1491), the United States did not state (contrary to petitioner's suggestion, see Pet. 4) that petitioner's as-applied challenge was a meritorious one. Indeed, the United States criticized the approach endorsed by two of the members of the Fourth Circuit panel—under which there would be a rebuttable presumption that detention could not last beyond six months—as "lack[ing] a specific foundation in the text or history of Section 1226(c)." Gov't Br. at 48, *Demore*, *supra*. Furthermore, to the extent an as-applied challenge would lie under *Demore* in truly exceptional cases, it would be necessary for the alien to show a significant departure from the time that reasonably would be expected to conduct the hearings and appeals that were called for in the particular case, and to exclude from consideration any delays attributable to the alien. The Fourth Circuit did not conduct any such analysis in its decision on the habeas appeal.

tion of 28 U.S.C. 2680(a). Indeed, the plain text and structure of the FTCA preclude petitioner's interpretation of the proviso. When Congress enacted the law enforcement proviso in 1974, it placed the proviso *within* the intentional tort exception, Section 2680(h).[5] Although provisos sometimes have a broader import, it is customary to use a proviso to refer only to things covered by the preceding clause. See *United States* v. *Morrow*, 266 U.S. 531, 535 (1925) ("[T]he presumption is that, in accordance with its primary purpose, [a proviso] refers only to the provision to which it is attached."); 82 C.J.S. *Statutes* § 370, at 494 (1999) ("The operation of a proviso usually is confined to the clause or distinct portion of the enactment which immediately precedes it, or to which it pertains, or is attached.") (footnotes omitted); see also *Alaska* v. *United States*, 125 S. Ct. 2137, 2159 (2005), judgment, 2006 WL 152590 (entered Jan. 23, 2006). Here, the text and structure of Section 2680 strongly reinforce the conclusion that the proviso has the customary scope of modifying only the preceding clause.

Significantly, Congress did not make the law enforcement proviso an exception to any of the other exceptions that are contained in Section 2680, such as the due care exception, which it reasonably could have done if it had

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[5] Section 2680(h) excepts from the FTCA's provisions: "Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. 2680(h).

intended to modify those preexisting exceptions as well. Moreover, the text of the proviso relates only to the preceding clause of subsection (h) and, referring specifically to some (but not all) of the intentional torts excepted in that prior clause, negates the prior clause's application in certain defined instances. See 28 U.S.C. 2680(h). And finally, the proviso expressly states that all provisions of "this chapter"—which includes the due care exception in Section 2680(a)—shall apply to claims brought under the proviso. 28 U.S.C. 2680(h). In short, given its text and placement in the statute, the law enforcement proviso is properly read as an exception only to the first clause of Section 2680(h)—the clause excepting certain intentional torts from the FTCA's coverage.

To read the law enforcement proviso more broadly, as a limitation not only upon the intentional tort exception but also upon the other Section 2680 exceptions, would allow tort suits against the United States that Congress plainly intended to bar. For example, there is nothing in the language or structure of the law enforcement proviso that suggests Congress intended to permit any intentional tort suits with respect to acts or omissions of law enforcement officers for claims arising in a foreign country. Such a claim, even if it fell within one of the specified intentional tort claims permitted by the law enforcement proviso, would nevertheless be barred by Section 2680(k), which prohibits all tort claims "arising in a foreign country." Cf. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 699-712 (2004) (holding that foreign country exception barred FTCA claim for false arrest); cf. also *Gasho* v. *United States*, 39 F.3d 1420, 1433-1434 (9th Cir. 1994) (holding that conduct falling within the law enforcement proviso of Section 2680(h) is not exempt from the "detention of goods" exception to the

FTCA set forth in Section 2680(c)), cert. denied, 515 U.S. 1144 (1995); *Gray* v. *Bell*, 712 F.2d 490, 507-508 (D.C. Cir. 1983) (holding that conduct falling within the law enforcement proviso of Section 2680(h) is not exempt from the discretionary function exception to the FTCA), cert. denied, 465 U.S. 1100 (1984); *Medina* v. *United States*, 259 F.3d 220, 225 (4th Cir. 2001) (same).

Moreover, contrary to petitioner's assertion (Pet. 16-18), reading the law enforcement proviso as an exception only to the intentional tort exception of Section 2680(h) does not render the law enforcement proviso meaningless. Rather, as petitioner appears to recognize (Pet. 18), it simply means that *some* claims that fall within the law enforcement proviso will nevertheless be barred by some other provision of the FTCA.

b. Petitioner cites no court of appeals decision that conflicts with the decision below. Indeed, petitioner cites no other decision by any other court of appeals that even addresses the question presented here: whether the due care exception of Section 2680(a) applies if the law enforcement proviso of Section 2680(h) also applies. To the contrary, petitioner candidly acknowledges that "the decision below is the *first* case to analyze the law enforcement proviso's interplay with § 2680(a)'s due care provision." Pet. 8-9 (emphasis added).

Petitioner nevertheless seeks this Court's review based on an asserted conflict (Pet. 9-15) among the courts of appeals as to whether the *discretionary function* exception of Section 2680(a) applies where the law enforcement proviso of Section 2680(h) also applies. Even if this Court was inclined to review the interplay between the discretionary function exception and the law enforcement proviso, this case does not present that question. The due care and discretionary function ex-

ceptions, while set forth in the same subsection, pertain to different types of conduct. See 28 U.S.C. 2680(a). As explained above, the due care exception applies when a federal employee is executing a federal statute or regulation. The discretionary function exception, by contrast, applies when a federal employee is acting pursuant to discretion conferred upon him or her, such that no mandatory federal statute, regulation, or policy prescribes a specific course of action. *E.g.*, *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988) (discretionary function exception does not apply where mandatory and specific statutes or regulations leave no "element of judgment or choice" such that "[t]he employee has no rightful option but to adhere to the directive").

More importantly, the reasoning in the cases upon which petitioner relies as purportedly in conflict with the decision below turns on the nature of the discretionary function exception. For example, in refusing to hold that the discretionary-function hurdle must be met in all cases, the Fifth Circuit in *Sutton* v. *United States*, 819 F.2d 1289 (5th Cir. 1987), applied this Court's decision in *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984), regarding the scope of the discretionary function exception. See *Sutton*, 819 F.2d at 1294, 1298. Moreover the *Sutton* court relied upon its concern that the discretionary function exception could "result in judicial repeal of the law enforcement proviso" with respect to malicious prosecution cases, which often involve discretionary acts and for which the Fifth Circuit believed Congress intended to allow an FTCA claim. *Id.* at 1295; contra *Gray*, 712 F.2d at 507 (finding "no serious incongruity between" the immunity afforded under the discretionary function exception and the waiver of immunity set forth

in the law enforcement proviso). But the *Sutton* court's reasoning whatever its merit in the context of the discretionary function exception, has no application with respect to the due care exception, which is triggered not by the exercise of discretion but by the execution of a federal statute or regulation.[6]

But even if this were a case involving the interplay between the discretionary function exception and the law enforcement proviso, further review would be unwarranted. Although there is some disagreement in reasoning among the circuits as to the interrelationship of those two FTCA provisions, that disagreement does not rise to the level of a conflict warranting review by this Court at this time.

The D.C. Circuit decision cited by petitioner is fully in accord with the rule in the Fourth Circuit, and thus presents no conflict. See Pet. App. 8a.[7] Likewise, the decisions of the Second and Third Circuits cited by petitioner do not establish a conflict. The Second Circuit, by petitioner's own characterization, merely "intimated" in *Caban* v. *United States*, 671 F.2d 1230 (1982), "that § 2680(a) should not bar a valid § 2680(h) claim." Pet. 13. And, as petitioner also recognizes, the Third Circuit

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[6] To be sure, the court below saw no reason for treating the due care exception differently than the discretionary function exception, see Pet. App. 8a, but that does not mean that other circuits would apply their different reasoning with respect to the discretionary function exception to a due-care case such as this one.

[7] Compare *Gray*, 712 F.2d at 507 ("We * * * reject the contention that intentional tort claims based on the acts of 'investigative or law enforcement officer[s]' may never come within the purview of the discretionary function exception to section 2680(a)") with *Medina*, 259 F.3d at 225 ("[W]e are convinced that the D.C. Circuit resolved this question correctly in its decision in *Gray*."). Accord *Gasho*, 39 F.3d at 1433, 1435-1436.

in *Pooler* v. *United States*, 787 F.2d 868, cert. denied, 479 U.S. 849 (1986), "did not specifically answer whether § 2680(a)'s discretionary function exception presents a hurdle to § 2680(h) claims generally." Pet. 15. Rather, the Second Circuit held in *Caban* that the alleged acts did not fall within the discretionary function exception, see 671 F.2d at 1233, and the Third Circuit held in *Pooler* that the claims before it did not fall within the terms of the law enforcement proviso, see 787 F.2d at 872. Finally, although the Fifth Circuit's decision in *Sutton*, which was rendered more than 18 years ago, contains reasoning that is at odds with the approach taken by the Fourth and D.C. Circuits, the Fifth Circuit did not purport to "declare categorically * * * the circumstances in which either the discretionary function exception or the law enforcement proviso governs to the exclusion of the other." *Sutton*, 819 F.2d at 1298.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

RICARDO ANTONIO WELCH, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
ARGUMENT	1
A. Mr. Welch Has Established a False Imprisonment Claim under § 2680(h)'s Law Enforcement Proviso and Thus Is Not Testing the Validity of INA § 236(c) or Pursuing a Constitutional Tort	2
B. Section 2680(a) Does Not Shield the United States from Liability for Unconstitutional Conduct	3
C. The Government's Argument Regarding the Placement of the Law Enforcement Proviso in § 2680(h) Is Fundamentally Flawed	5
D. There Is No Consensus Regarding the Interplay of § 2680(a) and § 2680(h)	7
CONCLUSION	9

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Carlson v. Green, 466 U.S. 12 (1980) 3

Garcia v. United States, 896 F. Supp. 467 (E.D. Pa. 1995) 3

Medina v. United States, 259 F.3d 220 (4th Cir. 2001) 4, 8

Rhoden v. United States, 55 F.3d 428 (9th Cir. 1995) 3

Sutton v. United States, 819 F.2d 1289 (5th Cir. 1987) 1, 6, 7, 8

United States v. Olson, 126 S. Ct. 510 (2005) 1

Welch v. Ashcroft, 293 F.3d 213 (4th Cir. 2002) 2

STATUTES

8 U.S.C. § 1226(c)(1)(B) 2

28 U.S.C. § 1346(b) 6

28 U.S.C. § 2680(a) 1, 3, 6, 7, 8

28 U.S.C. §§ 2680(b)-2680(n) 5

28 U.S.C. § 2680(h) 1, 3, 4, 6

28 U.S.C. § 2680(k) 5

LEGISLATIVE HISTORY

S. Rep. No. 93-588 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2789 7

ARGUMENT

The Government tries to artificially deconstruct § 2680(a) into two separate and distinct sections of the FTCA in an effort to avoid addressing the conflict that this Petition presents. The Government's position is without legal support and should be rejected. The Court should grant *certiorari* to resolve the conflict among the Courts of Appeals as to whether a claim established under the FTCA's law enforcement proviso must first overcome the hurdle of § 2680(a)'s general exceptions to the United States' waiver of sovereign immunity. The Fourth Circuit held that Mr. Welch's false imprisonment claim, even if established under § 2680(h), must first overcome § 2680(a)'s general exceptions. (Pet. App. at 8a.) This decision exacerbates the disagreement among the Courts of Appeals regarding the proper interplay between the law enforcement proviso and § 2680(a). In particular, the Fourth Circuit decision is in conflict with Fifth Circuit precedent. *See Sutton v. United States*, 819 F.2d 1289, 1296 (5th Cir. 1987) ("The government is to be liable . . . *in any case* in which a Federal agent commits acts which under accepted tort principles constitute one of the intentional torts enumerated in the [law enforcement] proviso.").

This case provides an ideal vehicle for the Court to address and resolve this conflict. The Petition presents a clear and undisputed factual record, and thus affords a straightforward review of the legal issues. Moreover, earlier this term during oral argument in *United States v. Olson*, the Court questioned the function that the due care provision serves. *See* Transcript of Oral Argument at 15-16, *Olson*, 126 S. Ct. 510 (2005). In that regard, Mr. Welch's Petition presents the opportunity to address that question and also presents issues that are more prevalent

than, and at least as important as, the three FTCA cases already heard by the Court this term. Absent resolution of the conflict presented here, the federal judiciary will continue to expend resources struggling to interpret the interplay between law enforcement proviso and § 2680(a)'s general exceptions. (Pet. at 9-10.)

A. Mr. Welch Has Established a False Imprisonment Claim under § 2680(h)'s Law Enforcement Proviso and Thus Is Not Testing the Validity of INA § 236(c) or Pursuing a Constitutional Tort

The Government's entire argument is based on its assertion that Mr. Welch's claim "falls squarely within" § 2680(a)'s due care exception, assuming away the very question this Petition presents, *i.e.*, whether § 2680(a) general exceptions apply at all. (Opp. at 7.) In so doing, the Government considers it irrelevant that Mr. Welch's detention falls squarely within § 2680(h)'s law enforcement proviso. Mr. Welch has satisfied all the elements of a false imprisonment tort under Maryland law. (Pet. at 16.) Mr. Welch's 422-day detention was unlawful because it was without "legal justification," and the Government does not argue otherwise.[1]

In pursuing his false imprisonment claim, Mr. Welch is not using the FTCA to test the validity of INA § 236(c) or seeking recovery for a constitutional tort simply because

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[1] The Government's suggestion that its failure to petition for *certiorari* in *Welch I* does not preclude them from re-litigating the constitutionality of INA § 236(c) as applied to Mr. Welch is without merit. (Opp. at 11 n.4.)

the statute was found unconstitutional.[2] (Opp. at 10.) ("[I]f petitioner's reading of the due care exception were correct, challenges to the constitutionality of statutes could be brought by way of an FTCA action."). Indeed, "no authority" exists that "would support a holding that claims which are otherwise actionable under state law are prohibited under the FTCA simply because the challenged conduct also violates the Constitution. In fact, case law is to the contrary." *See Garcia v. United States*, 896 F. Supp. 467, 475 (E.D. Pa. 1995) (citing *Rhoden v. United States*, 55 F.3d 428, 432 n.5 (9th Cir. 1995) (per curium)); *Carlson v. Green*, 466 U.S. 14, 19-20, 23 (1980) (noting that same conduct might give rise to both Bivens and FTCA actions) (other citations omitted)). To the extent that the Fourth Circuit's decision bars a FTCA claim because it in part arises from unconstitutional conduct, it creates conflicts with the authority cited above.

B. Section 2680(a) Does Not Shield the United States from Liability for Unconstitutional Conduct

The Government's, and the Fourth Circuit's, reliance on the plain language rule to interpret § 2680(a)'s due care provision is misplaced. Acting with due care does not mean simply following the mandates of a statute. *See* Pet. at 23-25. The Government's conclusory contention that the due care provision bars Mr. Welch's claim sidesteps two critical points, whether conduct that establishes a § 2680(h) claim: (1) must overcome § 2680(a)'s general exceptions in the first instance; and (2) if so, whether such a claim can be barred by § 2680(a)'s due care provision where the underlying

[2] Indeed, Mr. Welch's false imprisonment claim accrued when he proved himself bailable, not when he was provided a bail hearing.

conduct also violates substantive constitutional rights. Indeed, this Petition seeks to have the Court resolve these two precise issues.

Courts repeatedly have deemed sovereign immunity waived, and the United States liable, when constitutional rights are violated in a manner that also constitutes an intentional tort under the law enforcement proviso. *See* Pet. at 21 n.6. Despite the violation of Mr. Welch's constitutional rights, the Government declares that in this case "the federal officers executed their statutorily prescribed obligation to detain petitioner 'with due care' under 28 U.S.C. 2680(a)." (Opp. at 8.) The Government acknowledges (albeit in a footnote) that courts have refused to allow § 2680(a)'s discretionary function provision to bar a claim based on unconstitutional conduct, as "federal officers do not possess discretion to violate constitutional rights or federal statutes." (Opp. at 9 n.2) (quoting *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001) (citation omitted)).

The Government argues, however, that this precedent has "no application" to the present claim because § 2680(a)'s due care provision "applies whether or not the statute pursuant to which the officer acted is unconstitutional." (Opp. at 9 n.2.) The Government cites no authority for that contention, and ignores § 2680(a)'s conditional phrase "exercising due care." Instead, the Government improperly focuses on the phrase "whether or not such statute or regulation be valid." By conflating these two phrases, the Government equates the due care clause with barring all claims involving the non-negligent execution of a statute. Such a position is without authority and has the effect of adding a negligence element to Mr. Welch's intentional tort claim. *See* Pet. at 26.

C. The Government's Argument Regarding the Placement of the Law Enforcement Proviso in § 2680(h) Is Fundamentally Flawed

Contrary to the Government's assertion, Mr. Welch is not seeking a categorical rule with respect to how § 2680(h)'s law enforcement proviso interplays with *all* of § 2680's exceptions to the United States' waiver of sovereign immunity. In fact, other than § 2680(a), all of the other subsections in § 2680 provide for specific exceptions to the United States' waiver of sovereign immunity. How to reconcile a *specific* waiver of sovereign immunity with *specific* exceptions to the waiver of sovereign immunity in §§ 2680(b)-2680(n) is not the matter before the Court.[3] The question presented here is how § 2680(a)'s *general* exceptions should be reconciled with a claim brought under § 2680(h).

In an effort to avoid this question, the Government maintains that "the law enforcement proviso is properly read as an exception only to the first clause of Section 2680(h)." (Opp. at 13.) Such an interpretation is implausible. The Government claims that if Congress wanted to "make the law enforcement proviso an exception to any of the other exceptions that are contained in Section 2680," it

[3] That the Government uses the specific waiver of sovereign immunity in § 2680(k) to illustrate its erroneous contention is a thinly-veiled attempt to alarm the Court with the specter of alleged terrorists recovering damages from the United States for intentional harm suffered in foreign countries. (Opp. at 13) ("[N]othing in the language or structure of the law enforcement proviso that suggests Congress intended to permit any intentional tort suits with respect to acts or omissions of law enforcement officers for claims arising in a foreign country.") As noted above, this case does not present how § 2680(h)'s law enforcement proviso should be reconciled with §§ 2680(b)-2680(n)'s specific exceptions to the waiver of sovereign immunity.

could have done so by "modify[ing] those preexisting exceptions as well." (Opp. at 13.) The law enforcement proviso, however, provides for the specific waiver of sovereign immunity for six enumerated intentional torts. Its placement in § 2680(h) is logical; Congress' unequivocal intent was to carve out an exception to the blanket prohibition for intentional torts in § 2680(h).

Section 2680(h)'s law enforcement proviso is unique in that it is the only subsection in § 2680 that actually *waives* the United States' sovereign immunity, as opposed to preserving it. Section 2680(h) states that "with regard to acts or omissions" of federal law enforcement officers, "the provisions of this chapter and section 1346(b) *shall apply to any claim* arising, on or after the date of this proviso" to certain intentional torts. (Pet. App. at 25a) (emphasis added). By explicitly referencing § 1346(b), it is clear that Congress meant for the law enforcement proviso, the FTCA's *only* specific *waiver* of sovereign immunity, to apply to any "injury" caused by a "wrongful act" of a government actor.

As the Fifth Circuit noted, it can be "safely presume[d]" that Congress was aware of § 2680(a)'s general exceptions when Congress amended § 2680(h). *Sutton v. United States*, 819 F.2d 1289, 1294-95 (5th Cir. 1987); *see also* Pet. at 17 & 17 n.5. Such an interpretation is in accord with legislative intent. The Senate expressly intended that § 2680(h)'s law enforcement proviso would apply to "any case" in which law enforcement officials commit intentional torts "while acting within the scope of

his employment or under color of Federal law." S. Rep. No. 93-588, at 2791 (1974), *reprinted in* U.S.C.C.A.N. 2789.[4]

D. There Is No Consensus Regarding the Interplay of § 2680(a) and § 2680(h)

Since 1974, when Congress amended FTCA § 2680(h) to waive the United States' sovereign immunity for certain intentional torts committed by law enforcement officers, courts have differed on how to analyze its interplay with § 2680(a)'s general exceptions to the waiver of sovereign immunity. *See* Pet. at 9-15. In an attempt to dismiss the conflict among the Courts of Appeals, the Government artificially deconstructs § 2680(a)'s general exceptions, treating the discretionary function clause and due care clause as if they are two separate, distinct sections of the FTCA.

However, the Fourth Circuit rejected any distinction between § 2680(a)'s general exceptions and held that there was "no compelling reason . . . for treating the parallel 'due

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[4] This case is not, and never has been, about the personal liability of federal officers. Contrary to the Government's assertion, Mr. Welch is not "arguing for an interpretation of the FTCA under which . . . federal officers would have to substitute their judgment for that of Congress . . . ." (Opp. at 10.) The fundamental purpose of the FTCA is to hold the *United States* liable for the negligent or "wrongful act or omission" of a government employee "acting within the scope of his office or employment" where the United States, "if a private person, would be liable" under the law of the state "where the act or omission occurred." (Pet. App. at 24a.) Mr. Welch is seeking a remedy from the United States for the "wrongful act" inflicted upon him by a government official who was "acting within the scope of his office or employment." *See Sutton*, 819 F.2d at 1292 (noting that the FTCA was "designed 'to afford easy and simple access to the federal courts for persons injured by the activities of government' ") (citations omitted).

care' exception differently [from the discretionary function exception]." (Pet. App. at 8a.) Such treatment is appropriate because § 2680(a) contains both exceptions and thus any § 2680(a) analysis is one two-pronged inquiry, not two separate inquiries.[5] Although the Government acknowledged the Fourth Circuit's holding, it dismissed out-of-hand the consequential implications of the Fourth Circuit's decision. (Opp. at 16 n.6) ("[T]hat does not mean that other circuits would apply their different reasoning with respect to the discretionary function exception to a due-care case . . . .").

The Government's attempt to hide behind its strained deconstruction of § 2680(a) to minimize the disagreement among the Courts of Appeals must fail. Although the Government imposes its own judgment on the extent of the conflict among the Courts of Appeals, stating that the "disagreement does not rise to the level of a conflict warranting review," (Opp. at 16), the fact remains that a conflict *does* exist. The Government, moreover, trivializes the direct conflict the decision below has with the Fifth Circuit's decision in *Sutton*, 819 F.2d 1289, by emphasizing that it was "rendered more than 18 years ago." (Opp. at 17.) However, that there remains no clear answer, even after almost two decades, to how the law enforcement proviso interplays with § 2680(a)'s general exceptions only further supports the need for resolution by the Court. Uniformity is essential to federal jurisprudence. The Court

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[5] Courts have focused their inquiry on the discretionary function provision because there was no reason to go farther. *See, e.g.*, *Medina v. United States*, 259 F.3d 220, 224 (4th Cir. 2001) ("Because we conclude that the [federal] agents were carrying out such a discretionary function, we need only address and answer the [discretionary function] inquiry.").

should grant *certiorari* and provide clear guidance to the lower courts on this important and recurring issue.

CONCLUSION

For the reasons set forth herein, and in the Petition, *certiorari* should be granted and the decision below should be reversed.

Respectfully submitted,

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